RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

**On Petition for Writ of Certiorari
To The New York State Supreme Court,
Appellate Division, Second Department**

PETITION FOR WRIT OF CERTIORARI

JONATHAN I. EDELSTEIN
Counsel of Record
271 Madison Avenue, 20th Floor
New York, NY 10016
(212) 871-0571 x208
jonathan9@earthlink.net

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STATEMENT OF QUESTIONS PRESENTED

1. Under Padilla v. Kentucky, 130 S. Ct. 1473 (2010), is it ineffective assistance for an attorney to wrongly inform his client that he *will* face mandatory deportation if he accepts an offered plea, and may prejudice be established by the disparity between the offered plea and the sentence received after trial?

PARTIES TO THE PROCEEDING

The parties to the instant case are the People of the State of New York and petitioner Anwar Haque.

TABLE OF CONTENTS

Statement of Questions Presented i

List of Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

List of Reported Opinions 1

Jurisdictional Statement 2

Constitutional Provisions and Statutes at Issue 3

Statement of Facts 4

Argument 9

POINT I

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE UNDER PADILLA v. KENTUCKY WHERE HIS ATTORNEY WRONGLY INFORMED HIM THAT HE WOULD FACE MANDATORY DEPORTATION IF HE ACCEPTED AN OFFERED PLEA, AND HIS SENTENCE AFTER TRIAL WAS 20 TIMES THE PENALTY OFFERED 9

Conclusion 21

Appendix A1

Decision of the Appellate Division, Second Department, Dated February 16, 2010 ..... A1

Order of the New York Court of Appeals Dated June 9, 2010 ..... A6

TABLE OF AUTHORITIES

Cases:

Alberto-Gonzalez v. INS,
215 F.3d 906 (9th Cir. 2000) 16

Fong Haw Tan v. Phelan,
333 U.S. 6, 10 (1948) 11,12

Henry v. Poole,
409 F.3d 48 (2d Cir. 2005) 21

McMann v. Richardson,
397 U.S. 759 (1970) 13

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) ..... *passim*

People v. Fogle,
307 A.D.2d 299 (N.Y. App. Div. 2003) 23n

People v. Haque,
70 A.D.3d 967 (N.Y. App. Div. 2010) 1

People v. McDonald,
1 N.Y.3d 109 (2003) 20n

Pham v. United States,
317 F.3d 178 (2d Cir. 2003) 19

Rosario v. Ercole,
___ F.3d ___,
2010 U.S. App. LEXIS 16675
(2d Cir. 2010) 22,23

Rosario v. Ercole,
601 F.3d 118 (2d Cir. 2010) 21,22

Strickland v. Washington,
466 U.S. 668 (1984) 13,15,18,19,
..... 20,21,22,23

United States v. Campbell,
778 F.2d 764 (11th Cir. 1985) 20

United States v. Couto,
311 F.3d 179 (2d Cir. 2002) 20n

United States v. Gordon,
156 F.2d 376 (2d Cir. 1998) 19

United States v. Graham,
169 F.3d 787 (3d Cir. 1999) 16

United States v. Guzman-Bera,
216 F.3d 1019 (11th Cir. 2000) 16

United States v. Pacheco,
225 F.3d 148 (2d Cir. 2000) 17

Statutes and Regulations:

U.S. Const. Amend. 6 3

8 U.S.C. § 1101 15,16

8 U.S.C. § 1227 ..... 16n

8 U.S.C. § 1229b 16

28 U.S.C. § 1257 2

N.Y. Penal Law § 105.10 4

N.Y. Penal Law § 155.35 4

N.Y. Penal Law § 155.40 4

N.Y. Penal Law § 175.10 4

N.Y. Penal Law § 190.65 4

N.Y. Penal Law § 470.20 4

U.S. Sup. Ct. Rule 10 10

U.S. Sup. Ct. Rule 13 2

REPORTED OPINIONS

People v. Anwar Haque, 70 A.D.3d 967, 897 N.Y.S.2d 130 (N.Y. App. Div. 2010)

The order of the New York Court of Appeals denying discretionary review, dated June 9, 2010, is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because this is a petition for *certiorari* from a final judgment of the New York Appellate Division, Second Department, in a criminal case. The Appellate Division is "the highest court of [the] State in which a decision could be had" because petitioner sought, but was denied, leave to appeal to the New York Court of Appeals.

This petition is timely because petitioner's application for discretionary review by the New York Court of Appeals was denied on June 9, 2010. See Supreme Court Rules, § 13(1). There have been no orders extending the time to petition for *certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

The genesis of this case was "Operation Stars and Swipes," an investigation of credit card theft in the County of Queens, State of New York. Petitioner, a merchant in Jackson Heights, Queens, was implicated in the scheme. It was alleged that petitioner and other merchants would collude in "bust-out" credit card transactions. These consisted of sham transactions in which the merchants would process fake sales up to the credit limit on each card and split the proceeds with the card holder. It was alleged that the total amount obtained through this scheme was in excess of $6 million.

In 2002, petitioner was indicted by a Queens County grand jury on charges of money laundering in the first degree (N.Y. Penal Law § 470.20); grand larceny in the second degree (N.Y. Penal Law § 155.40, five counts); grand larceny in the third degree (N.Y. Penal Law § 155.35); falsifying business records in the first degree (N.Y. Penal Law § 175.10, four counts); conspiracy in the fourth degree (N.Y. Penal Law § 105.10) and scheme to defraud in the first degree (N.Y. Penal Law § 190.65, two counts).

Trial commenced in the Supreme Court, Queens County, before the Hon. Roberta J. Dunlop,

on January 5, 2004. Petitioner was tried jointly with co-defendant Abed "Jim" Shrayef.

On March 2, 2004, Shrayef's counsel, Michael Schwed, Esq., was suddenly rushed to the hospital for heart surgery. A mistrial was a distinct possibility. Finding this prospect unpalatable after two months of trial, the prosecutor offered petitioner a plea under which he would spend six months in jail followed by five years' probation. Petitioner, who is a Bangladeshi national without American citizenship, declined this offer out of fear that the plea would subject him to deportation.

At a later point in trial, Shrayef entered a guilty plea under which he agreed to serve three months in jail. The trial judge, outside the presence of the jury, mentioned the plea and advised petitioner that he might face consecutive sentences if convicted at trial. (T.5242-43). She suggested that petitioner "think as to whether he wishes to proceed or if he would like to see if there is an offer available." (T.5243).

Petitioner's counsel responded:

> Mr. Haque is concerned about the fallout from the immigration. That is

> something we have to investigate a little further. *I investigated a little further.* We are going to need at least a day to do that.

(T.5243) (emphasis added).

The trial proceeded to verdict and the jury convicted petitioner of all counts except one count of falsifying business records.

Petitioner appeared for sentencing on July 21, 2004. Prior to imposition of sentence, he was given an opportunity to address the Court. He stated, *inter alia*, as follows:

> I should have pled guilty before this trial ever began. It was – it was the fear of shame and the possibility of deportation to my former country where I may face [the] potential of being tortured and even summarily executed by entitled [sic] loyalties to the former government and incumbent Bangladesh National Party BNP, party of Bangladesh.
>
> My refusal to accept six months jail and

> five years probation... was not out of arrogance or ingratitude. I am not a citizen, your Honor, and this conviction will cause me to be deported. I love this country. It is my home. I take great pride in the fact that my five youngest children are citizens of this country.
>
> Were I to be deported, I would face leaving my children or taking them away from this great country. This is a choice I could not face.

(S.53-54).

The trial court then proceeded to sentence petitioner to an aggregate prison term of 21⅓ to 64 years. It should be noted that the others arrested with petitioner received sentences ranging from no jail time to 1⅓ to 4 years.

Petitioner appealed his conviction to the Appellate Division, Second Department. His retained counsel filed a brief arguing nine points. Petitioner, by permission of the court, filed a supplemental *pro se* brief. In this brief, he argued *inter alia* that his trial counsel was ineffective for falsely informing him that the plea offer would make

him subject to mandatory deportation, when in fact it would not have done so. Petitioner invoked both the Federal and State standards of ineffective assistance.

On February 16, 2010, the Second Department affirmed petitioner's conviction and sentence, albeit noting that by operation of law, his aggregate sentence was reduced to 10 to 21 years. (A1-5). The court disposed of the ineffective assistance claim in a single, one-sentence paragraph:

> The defendant's trial counsel provided meaningful representation and, thus, the defendant was not deprived of the effective assistance of counsel (see People v Benevento, 91 NY2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629).

(A4).

Petitioner then sought leave to appeal to the New York Court of Appeals, the highest court in New York State. In addition to his counseled leave application, petitioner submitted a supplemental *pro se* application which included the issue of being incorrectly informed about the immigration consequences of his plea.

When this Court decided Padilla v. Kentucky, 130 S. Ct. 1473 (2010), petitioner submitted a further letter to the Court of Appeals advising it of the Padilla decision and urging it to review his ineffective assistance claim.

On June 9, 2010, the Hon. Susan Phillips Read of the New York Court of Appeals denied leave to appeal. (A6-7). This petition followed.

ARGUMENT

POINT I

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE UNDER PADILLA v. KENTUCKY WHERE HIS ATTORNEY WRONGLY INFORMED HIM THAT HE WOULD FACE MANDATORY DEPORTATION IF HE ACCEPTED AN OFFERED PLEA, AND HIS SENTENCE AFTER TRIAL WAS 20 TIMES THE PENALTY OFFERED

This case presents a straightforward and compelling claim of ineffective assistance which falls squarely within this Court's Padilla precedent. Although this claim was disregarded by the State courts – quite possibly because it was included in

petitioner's *pro se* supplemental brief rather than in his counseled brief – the record is abundantly clear: petitioner was offered a highly advantageous plea that would not have subjected him to mandatory deportation, and he declined solely because he believed it would. Moreover, the record is clear that petitioner's trial counsel "investigated" the immigration consequences of the plea and that, either through misleading advice or at minimum failure to give correct advice, he failed to make defendant aware of the true situation.

This is, therefore, a case in which "a state court... has decided an important federal question in a way that conflicts with relevant decisions of this Court." See Supreme Court Rule 10(c). For the reasons detailed below, this Court should grant *certiorari* to review petitioner's Padilla claim or, alternatively, vacate the Appellate Division's decision and remand with instructions to reconsider in light of Padilla.

The Padilla Holding

Padilla emanated from a Kentucky state case in which a Honduran national pled guilty to marijuana trafficking. See Padilla, 130 S. Ct. at 1477. This offense subjected him to mandatory

deportation under current Federal law. Id. Before this Court, Padilla "claim[ed] that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he did not have to worry about immigration status since he had been in the country so long." Id. at 1478. Reversing the decision of the Kentucky Supreme Court, which denied Padilla's claim, this Court held "that constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." Id. at 1478.

This Court began its analysis by noting the sweeping changes which have occurred in American immigration law:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The

> "drastic measure" of deportation or removal, Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. This Court engaged in an extensive discussion of both the steadily increasing number of crimes that rendered aliens deportable and the steadily decreasing amount of judicial discretion to grant relief from deportation. See id. at 1478-80. As a result:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. at 1480 (emphasis added).

This Court then reiterated the principle that "[b]efore deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." Id. at 1480-81, citing McMann v. Richardson, 397 U.S. 759, 771 (1970); Strickland v. Washington, 466 U.S. 668, 686 (1984). Moreover, this Court emphasized that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance." Id. at 1481. Indeed, even if this Court were to apply such a distinction, the "unique nature of deportation," which is a "penalty" that is "intimately related to the criminal process," must place it within the "ambit of the Sixth Amendment right to counsel." Id. at 1481-82.

Turning to the Strickland standard for ineffective assistance, which requires as its first step a departure from an objective standard of reasonableness, see Strickland, 466 U.S. at 687-88, this Court held that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Padilla, 130 S. Ct. at 1482. "We too have previously recognized that preserving the

client's right to remain in the United States may be more important to the client than any potential jail sentence." Id. at 1483. Thus, where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [a] conviction," id., it is ineffective assistance not to advise the defendant of same:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect...

> When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. ***But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.***

Id. (emphasis added).

This Court accordingly held that "counsel must inform her client whether his plea carries a risk of deportation." Id. at 1486. Notably, counsel is not merely obliged to refrain from giving incorrect advice; instead, he or she has an affirmative obligation to give correct advice.

In conclusion, this Court found that Padilla had satisfied the ineffectiveness prong of Strickland, and remanded for determination of whether he could satisfy the prejudice prong. See id. at 1486-87.

Petitioner Received Ineffective Assistance Under Padilla

This is a case where, in this Court's words,

"the deportation consequence [of the offered plea] was truly clear." Pursuant to 8 U.S.C. § 1101(a)(43)(E)(iii), a theft offense is only an "aggravated felony" for immigration purposes if "the term of imprisonment [is] at least one year." The one year threshold refers to the actual term of imprisonment imposed, not the maximum term available under the statute of conviction. See United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000); United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000); Alberto-Gonzalez v. INS, 215 F.3d 906, 909-910 (9th Cir. 2000); United States v. Graham, 169 F.3d 787, 790 (3d Cir. 1999). Thus, the plea offered to petitioner Haque – a theft offense carrying a penalty of six months' jail and five years' probation – would not have been an aggravated felony, and would have left petitioner eligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a).[1] With the law "truly clear" in this fashion

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[1] To be sure, petitioner would be "deportable" under 8 U.S.C. § 1227(a)(2)(A)(i)(II) on the ground that the plea on offer related to an offense "for which a sentence of one year or longer may be imposed." However, he would not have been subject to *mandatory* deportation, and in practice, removal proceedings are frequently cancelled or never initiated for persons in this position.

– and all it would have taken for counsel to ascertain the truth would have been to read two statutes and conduct elementary case law research – petitioner's counsel was obliged to give him accurate advice concerning the immigration consequences of the plea.

This was obviously not done. The record makes it painfully clear that petitioner believed that the plea would make him subject to mandatory deportation and separation from his five American-born children. The only way he could have still been under this impression at sentencing was that, despite the "investigation" that counsel said he had done and would do, counsel never advised him of the true consequences.

Petitioner's claim is somewhat different from the majority of Padilla claims. Most such arguments are made by defendants who pled guilty to offenses carrying mandatory deportation, and who later assert that they would have gone to trial had they but known. The logic of Padilla is equally compelling, however, when applied to a defendant who *refused* a guilty plea based on the erroneous belief that he *would* be deported, and is subsequently convicted at trial.

Indeed, the logic may be even more compelling

in such a case. As this Court stated, "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." Padilla, 130 S. Ct. at 1486-87. Petitioner Haque, due to his counsel's incorrect advice – or, at minimum, failure to give correct advice – was unable to exercise this choice intelligently. Since he was deprived of one of the very options that this Court believed should be available to criminal defendants, such deprivation should support an ineffective assistance claim.

Moreover, the prejudice prong of Strickland is arguably easier to satisfy in cases like this one than in the common run of Padilla-type claims. Where a defendant who pled guilty claims that he would have gone to trial if he knew that he would be deported, a reviewing court must engage in inherently speculative analysis of whether he would likely have been convicted and what the probable penalty would have been upon conviction. Often, the likely consequence of trial will cut against any inference of prejudice arising from the deportation consequences of the plea.

In contrast, where a defendant *refuses* a plea offer based on an erroneous belief as to its

immigration consequences, the penalty incurred after trial reinforces rather than undermines the inference of prejudice. Not only does such a defendant now face certain deportation – a consequence he would have avoided had he pled – but he *also* faces a substantially longer prison term. If the disparity between the plea offer and the sentence after trial is sufficiently great – and in the instant case, petitioner's *minimum* sentence is 20 times as great as what he would have faced had he accepted the plea offer – this may in itself be sufficient to show Strickland prejudice. See United States v. Gordon, 156 F.2d 376, 381 (2d Cir. 1998); accord Pham v. United States, 317 F.3d 178, 182 (2d Cir. 2003) ("a significant sentencing disparity in combination with defendant's statement of his intention is sufficient to support a prejudice finding").

This Court should therefore find that petitioner has satisfied both prongs of Strickland as interpreted by Padilla, in that (a) he was offered a highly advantageous plea that would not have subjected him to mandatory deportation; (b) his counsel incorrectly informed him about the immigration consequences of the plea offer, or at minimum failed to correctly inform him of those consequences; (c) he refused the plea offer because of

his erroneous belief that he would be deported; and (d) he was prejudiced in that he is now an aggravated felon and must serve a minimum of 10 years in prison rather than six months.

The Appellate Division Erroneously Rejected Petitioner's Ineffective Assistance Claim

It is readily apparent from the above – indeed, overwhelmingly apparent – that the Appellate Division erred in rejecting petitioner's ineffective assistance claim.[2] Indeed, the Appellate Division did not even apply the two-prong Strickland test. Instead, it relied exclusively on the New York "meaningful representation" standard under which an attorney's prejudicial error might conceivably be excused if his overall performance was competent.

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[2] It should be noted that even before Padilla, both the Second Circuit and the New York Court of Appeals recognized that erroneous advice concerning the immigration consequences of a plea might constitute ineffective assistance. See United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); People v. McDonald, 1 N.Y.3d 109, 114 (2003); accord United States v. Campbell, 778 F.2d 764, 768-69 (11th Cir. 1985).

In a series of recent decisions, the Second Circuit has strongly criticized this aspect of the New York standard and held that, if applied to excuse an attorney's prejudicial mistake, it is contrary to Strickland. In Henry v. Poole, 409 F.3d 48, 72 (2d Cir. 2005), the court held that "counsel's competency in all other respects" did not excuse his prejudicial errors. Indeed, the Second Circuit held that, to the extent that the New York State court relied upon counsel's overall competency to find effective assistance, it "failed to apply the Strickland standard at all." Id.

In Rosario v. Ercole, 601 F.3d 118 (2d Cir. 2010), the Second Circuit further explored the interplay between the New York State ineffective assistance standard and Strickland. The majority opinion included, *inter alia*, the following:

> [The New York] approach... creates a danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. *That would produce an absurd result inconsistent with... the mandates of Strickland.*

Id. at 126 (emphasis added).

The petitioner in Rosario subsequently applied for *en banc* review which, on August 10, 2010, the Second Circuit denied. See Rosario v. Ercole, ___ F.3d ___, 2010 U.S. App. LEXIS 16675 (2d Cir. 2010). Notably, *all* the judges who opined as to this denial, both those who concurred and those who dissented, agreed that, under Strickland, "the prejudicial effect of *each error* is evaluated with regard to outcome" and without regard to counsel's overall performance. See id., *5 (Wesley, J., concurring in denial of rehearing *en banc*) (emphasis added); see also id., *5 (Katzmann, J., concurring in denial of rehearing *en banc*) (error to "find a lawyer effective by focusing on the fairness of the process as a whole"); id., *9 (Jacobs, J., dissenting from denial of rehearing *en banc*) (Strickland does not "allow[] the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance"); id., *13 (Pooler, J., dissenting from denial of rehearing *en banc*) ("den[ial of] relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation... is contrary to Strickland").

Moreover, noting the divergence of the Federal

and New York standards, the judges strongly advised New York courts to analyze ineffective assistance claims separately under Federal and State law. Id., *4-5, 6, 13, 14.

In the instant case, petitioner unmistakably invoked Strickland and cited to that decision in his supplemental *pro se* brief. It was thus error for the Appellate Division to ignore petitioner's demonstration of prejudicial error and instead affirm his conviction based on the holistic "meaningful representation" standard. Given the clear variance between the Appellate Division's decision and the recent controlling precedent of this Court, the instant petition for *certiorari* should be granted and this Court should either review petitioner's claim or remand to the State court with instructions to reconsider in light of Padilla.[3]

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[3] Assuming that any fact-finding is necessary to effectuate such reconsideration, the Appellate Division has the power to remand to the trial court for this purpose while retaining jurisdiction over the appeal. See People v. Fogle, 307 A.D.2d 299, 301-02 (N.Y. App. Div. 2003) (remitting to the trial court for factual findings relating to the defendant's ineffective assistance claim).

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition. Upon granting *certiorari*, this Court should review and vacate petitioner's conviction or, in the alternative, remand for reconsideration by the Appellate Division in light of Padilla.

Dated: New York, NY
August 31, 2010

JONATHAN I. EDELSTEIN